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In The Supreme Court of the United States

OCTOBER TERM

No. 73-238

Paul C. Moynahan, Petitioner

v.

State of Connecticut, Respondent

Brief In Opposition To Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

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The respondent State of Connecticut respectfully objects to the issuance of a writ of certiorari to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on April 24, 1973 and amended on May 23, 1973.

I. Constitutional And Statutory Provisions

United States Constitution Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereon, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any

person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution State of Connecticut, Article 1, S. 8:

In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed. No person shall be held to answer for any crime punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the military when in actual service in time of war or public danger."

Connecticut General Statutes, Section 53-65: Receiving Stolen Goods:

"Any person who receives and conceals any stolen goods or articles, knowing them to be stolen, shall be prosecuted and punished as a principal, although the person who committed the theft is not convicted thereof."

Connecticut General Statutes, Section 54-47: Investigations into commission of crime:

"Whenever it appears to the superior court for any county that the administration of justice requires an investigation to determine whether or not there is probable cause to believe that a crime or crimes have been committed within the county, said court may order an inquiry to be made into the matter, to be conducted before any judge of said court or a state referee designated by it. Such inquiry shall be conducted in public or private as said court orders. The attendance of witnesses and the production of documents at such inquiry may be compelled by subpoena, signed by any official authorized to issue such process. If any witness properly summoned fails to appear or to produce any documents included in such subpoena, or if he fails to answer any proper question, the judge or referee conducting such inquiry may report the matter to the state's attorney for the county wherein the investigation is being conducted and such state's attorney may file a complaint setting forth the facts at any criminal session of the superior court in such county. The court shall thereupon issue a citation to such witness to appear before said court and show cause why he should not be punished as for a contempt, and if, after hearing, the court finds that he failed to appear without due cause or failed to produce any document properly to be presented to the judge or state referee conducting the investigation or failed to answer any proper question in the course of such investigation, it may punish him as it might a witness failing to appear, to produce a document properly to be considered or to answer a proper question before the court. Witnesses

may be examined by the judge or state referee conducting the inquiry or by the state's attorney or by any other attorney or attorneys appointed by the court for such purpose. The official stenographer of said court or his assistant shall record any testimony so taken. At the conclusion of such inquiry the judge or referee conducting the same shall file with the court a report and the court shall direct whether, and to what extent, such report shall be made available to the public or interested parties. Any transcript of testimony taken at such inquiry shall likewise be filed with the court and it shall have the same powers with reference to it as it has with reference to the report; provided any person accused of crime as a result of such inquiry shall have access at all reasonable times to the transcript of his own testimony given by him in such inquiry. (1949 Rev., S 8777; 1953, Supp. S 3324d). General Statutes of Connecticut. Vol. IX, 545 (Revised to 1968).

Connecticut General Statutes; Section 51-175: State's attorneys; assistants; practice of criminal law by assistants and superior court clerks:

"The judges of the superior court shall appoint a state's attorney for each county, who shall act therein as attorney in behalf of the state, a state's attorney at Waterbury, who shall have the same powers and perform the same duties within the judicial district of Waterbury in New Haven county and at all criminal terms of the superior court at Waterbury as the state's attorneys in the several counties as the criminal business of the court may require, who, respectively, shall assist the state's attorneys for said counties and for said district in

all criminal matters and, in the absence from the county or district or disability of the state's attorney or at his request, shall have and exercise all the powers and perform all the duties of state's attorney. Each state's attorney appointed to such position after July 1, 1967, shall devote his full time to the duties of his office, shall not engage in the practice of law and shall not be a partner, member or associate of a law firm. They shall receive annual salaries as follows: Twenty-four thousand dollars for the counties of Fairfield, Hartford, New Haven and New London and twenty-two thousand dollars for the counties of Litchfield, Middlesex, Tolland and Windham, and for the state's attorney at Waterbury. The provisions of this section with respect to each state's attorney devoting full time to the duties of his office and not engaging in the practice of law or being a partner, member or associate of a law firm, shall not apply to any incumbent state's attorney for the term of his appointment or reappointment to any new term or terms, at the election of each such state's attorney. Each such state's attorney who so elects shall have his annual salary reduced by five thousand dollars. Each such state's attorney may terminate such election at any time. The comptroller shall deduct from such salaries five per cent thereof as contributions for the purposes of sections 51-49, 51-175a and 51-175b. No assistant state's attorney and no partner or associate of a law firm of which such attorney is a partner or associate and no clerk of assistant clerk of the superior court shall engage in the private practice of criminal law before the superior court for the county in which such attorney or clerk is engaged. The several state's attorneys and assistant state's

attorneys shall hold office for two years unless sooner removed by said judges. If any state's attorney or assistant state's attorney neglects to annually account for and pay over all moneys of the state received by him, his office shall become vacant; and the chief justice of the supreme court or the chief court administrator, on a certificate from the comptroller of such neglect, shall appoint another attorney or assistant attorney in his place, who shall hold office until the next annual meeting of the judges unless sooner removed by them. Said judges may remove any such attorney or assistant attorney from office and may fill any vacancy caused thereby, and they may fill any vacancy in either of said offices which may occur from any other cause. Any judge holding the superior court in any county in which any such vacancy exists may fill it until the next annual meeting of the judges, unless it is sooner filled by the judges at a special meeting. (1949 Rev., S. 17764; June, 1955, S. 3118d; 1963 P.A. 378; February 1965, P.A. 464; 1967, P.A. 622, S. 1)" General Statutes of Connecticut, Vol. IX, p. 57 (Revised to 1968).

Connecticut General Statutes; Section 54-86(a):

a. Upon motion of a defendant at any time after the filing of the indictment or information, and upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable, the court shall order the attorney for the state to permit that defendant to inspect and copy or photograph any relevant (1) exculpatory information or material; (2) written or recorded statements, admissions or confessions made by the defendant; (3) books, papers, docu-

ments or tangible objects obtained from or belonging to the defendant or obtained from others by seizure or process; (4) copies of records of any physical or mental examinations of the defendant; (5) recorded testimony of the defendant before a grand jury; and (6) records or prior convictions of the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known to the attorney for the state or to the defendant.

b. An order of the court granting relief under this section shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

c. A motion under this section may be made only in a criminal case and shall include all relief sought under this section. A subsequent motion may be made only upon a showing of cause why such motion would be in the interest of justice.

Connecticut General Statutes, Section 54-86(b):

a. In any criminal prosecution, after a witness called by the prosecution has testified on direct examination, the court shall on motion of the defendant order the prosecution to produce any statement oral or written of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified, and the court shall order said statement to be delivered directly to the defendant for his examination and use.
b. If the prosecution fails to comply with the order of the court, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court

in its discretion shall determine that the interests of justice require that a mistrial be declared.

Connecticut Practice Book; Section 226:
Objections to Evidence:
"Whenever an objection to the admission of evidence is made counsel shall state the grounds upon which it is claimed or upon which objection is made, succinctly and in such form as he desires it to go upon the record, before any discussion or argument is had. Argument upon such objection shall not be made by either party unless the court requests it and, if made, must be brief and to the point. An exception to the ruling must be taken in order to make it a ground of appeal. (P.B. 1951, Section 155.)" Connecticut Practice Book Rules and Forms p. 132 (Revision of 1963).

II. Questions Presented For Review

1. Was constitutional error committed when a necessary witness, without notice, invoked his privilege against self-incrimination in response to three (3) questions in the presence of the jury, answered numerous other questions, explained the invocation of his privilege, and the court gave cautionary instructions?

2. Was constitutional error committed when the court, in the absence of the jury, listened to testimony regarding alleged bias, interest or motive of a witness, and then ruled that such evidence was inadmissible on the grounds of irrelevancy, immateriality and remoteness?

3. Was constitutional error committed when the court permitted an investigating police officer to testify regarding the contents of a transcribed interview with the defendant?

4. Was constitutional error committed when the court charged the jury pursuant to the standard Connecticut instruction regarding the weight to be accorded the testimony of an accused person?

5. Was constitutional error committed when the court denied a motion to dismiss on the grounds that the state allegedly failed to completely comply with the order of the court regarding pre-trial production of claimed exculpatory material, which material was made available at the time of the trial?

6. Where all statements made by a witness concerning the subject matter of his direct testimony were turned over to the defendant after direct examination, were any rights of the petitioner to a full and fair hearing denied?

7. Was constitutional error committed when the court denied motions to quash and dismiss the information on grounds that the presence of a police officer at a session of the one-man investigatory Grand Jury allegedly violated Section 54-47 of the Connecticut General Statutes and that said section is "unconstitutional on its face and as applied"?

8. Was constitutional error committed when the court denied a motion to dismiss the information on the grounds that Section 51-175 of the Connecticut General Statutes which provides for the appointment of State's attorneys by the judges of the superior court, allegedly violates the Fourteenth Amendment of the United States Constitution and Article I S 8 and Article IV S 12 of the Constitution of the State of Connecticut?

III. STATEMENT OF THE CASE

Late in 1968 two people who were to be instrumental in an investigation of a stolen goods ring in the Waterbury area were languishing in jail. Mr. John Bishop was incarcerated in the Bridgeport Correctional Center and Mr. Charles Vernale was imprisoned at the State Prison in Somers, Connecticut. (Finding 123, P.R. p70)*

On October 25, 1968 Mr. John Bishop gave a written statement to the Connecticut State Police in which he informed them of his relationship with Charles Vernale and Vernale's relationship with the defendant, the deputy superintendent of the Waterbury Police Department. (Finding 124, 257, P.R. pp. 60, 99) Basically, Bishop was a thief who procured stolen merchandise and sold the same through Vernale, the fence. (Finding 4, 8, 9, 10, P.R. p. 60) The defendant was a regular visitor to Charlie Vernale's house and was described by Bishop as "Charlie's man in the Waterbury Police Department." (Findings 18, 21, P.R. p. 61)

Bishop had seen Vernale in the company of the defendant on different occasions at Vernale's house. (Finding 18, P.R. p. 61) In 1966 the defendant had seen John Bishop at Vernale's house and had said to him, "I don't care what business dealings you and Charles have between you. That is your business, but if you ever do anything in Waterbury, I will have to nail you for it." (Finding 19, P.R. p. 61)

On April 8, 1967, Bishop broke into the Martin Appliance Co., located at 126 Middletown Avenue in North Haven, Connecticut and stole a new twenty-two inch maple Motorola Color TV console, Model CL 720CS Serial Number 384498 and another television set. (Finding 1, 2, P.R. p. 60) Bishop loaded these television

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*P.R. - Printed Record in Supreme Court of the State of Connecticut

sets into his truck and took them to the home of Charles Vernale. (Finding 5, P.R. p. 60) Around the end of April or early May, 1967, Bishop helped Vernale load the Motorola taken from Martin's into Vernale's station wagon. (Finding 9, 11, P.R. p. 60) He and Vernale drove to the rear of the defendant's home and carried the set through the kitchen into Moynahan's living room and left it. (Finding 12, 16, P.R. pp. 60, 61) The defendant was present at this time, and perhaps, his wife. (Finding 13, P.R. p. 61) Bishop said nothing other than "Hello" or "Goodbye". (Finding 14, P.R. p. 61) Bishop noticed that the kitchen of the Moynahan home was being remodeled and electrical connectors were protruding from the bare walls on the right hand side of the kitchen. (Finding 15, P.R. p. 61)

In the middle of December, 1968, Captain Wayne Bishop, of the Connecticut State Police, commanding officer of this investigation, notified Superintendent Frederick Sullivan of the Waterbury Police Department that the State Police had information that the defendant had received stolen property. Superintendent Sullivan admitted that he immediately advised the defendant of this information.

Later in December, 1968, Mr. Timothy Moynahan, an attorney from Waterbury and son of the defendant, purchased a new color television for his parent's home.

After interviewing John Bishop, the Connecticut State Police went to the State Prison at Somers where Mr. Charles Vernale was serving a sentence for receiving stolen property. He had pleaded guilty to this charge in 1968 when he was represented by Attorney Moynahan. (Finding 218, P.R. p. 77) Attorney Moynahan admitted that he ceased formal representation of Mr. Vernale in December, 1968. Mr. Vernale agreed to cooperate with the police after he had a chance to talk to his daughter.

On February 3, 1969, Mr. Vernale's ex-wife and his daughter visited him at prison. Vernale told his

daughter to call Paul Moynahan and Attorney Moynahan to tell them to get rid of the gifts that he (Vernale) had given them. (St. App. pp. 82a, 86a)*

Attorney Moynahan admitted that he received such a call from Mr. Vernale's daughter on February 4, 1969 (St. App. pp. 82a, 86) He stated that he immediately went to the State's Attorney Office in Waterbury and advised Attorney Francis McDonald, State's Attorney for New Haven County at Waterbury, regarding an air conditioner that he had received from Mr. Vernale. (Finding 222, P.R. p. 77) Attorney Moynahan consented to having his office searched and a stolen air conditioner was, in fact, found and subsequently removed by the Connecticut State Police. (Finding 223, P.R. p. 78)

On this same date, February 4, 1969, Mr. Charles Vernale gave a recorded statement to the Connecticut State Police in which he admitted delivering a stolen television set to the home of the defendant.

On February 8, 1969, the defendant was invited to talk to State's Attorney Francis McDonald and Captain Wayne Bishop of the Connecticut State Police. (Finding 44, P.R. p. 63) Moynahan was advised of the nature of the inquiry concerning Charles Vernale and his receipt of stolen goods from Vernale. (Finding 46, 87, P.R. pp. 63, 67) The defendant was advised of his rights, waived his right to counsel and gave a recorded statement. (Finding 44, 45, P.R. p. 63) Captain Bishop testified that during this conversation the defendant admitted that he had known Charles Vernale for over ten (10) years as a "fence" and a thief, but nevertheless considered him a friend (Finding 47, 65, 66, 231, P.R. pp. 63, 65, 78): a friend whom the defendant admitted entertaining at his home for Thanksgiving dinner; with whom he had travelled from Florida to Waterbury; with whom he had exchanged furniture,

*St. App. - Appendix to Brief for State in Supreme Court of the State of Connecticut

and with whom he had frequently sailed on his (Vernale's) boat. (Finding 67, 68, 233, P.R. pp. 65, 78) Despite this friendship, the defendant maintained that he would never accept anything from Charles Vernale because of his reputation as a receiver of stolen goods, his criminal record and his activities, and he should have warned his son, Attorney Moynahan, not to accept gifts from him too. (Finding 50, 51, P.R. p. 64)

In this same conversation the defendant admitted knowing John Bishop as a breaking and entering man who brought stolen goods to Vernale. (Finding 47, P.R. p. 63) But the defendant denied that John Bishop and Charles Vernale had delivered a television set to his home and denied that a color television was in his home prior to December, 1968, when his son purchased one. (Finding 53, P.R. p. 64)

Subsequently, in the middle of February, 1969, members of the Connecticut State Police interviewed Mr. Edward Miller, a television repairman in Waterbury. (Finding 144, P.R. p. 70) Mr. Miller recalled receiving a telephone call from the defendant on a Sunday in June, 1967. (Finding 33, 34, 35, 36, P.R. p. 62) He proceeded to the defendant's home where he performed a unique repair on the sound coil of a large, floor model, Motorola 23" color television set, Early American Colonial, maple finish. (Finding 40, 41, 42, P.R. p. 63) Mr. Miller told the police that he soldered a wire within the sound coil, wrapped it with black tape and then replaced the sound coil in a metal shield. (Finding 40, P.R. p. 63) This repair could not be seen when the metal shield was in place (Finding 29, P.R. p. 62) Mr. Miller informed the police that if he saw this television chassis again he would recognize his work because of the unique nature of the repair. (Finding 43, P.R. p. 63)

On March 5, 1969, the Connecticut State Police reinterviewed Charles Vernale at the State Prison and he

affirmed his earlier statement regarding the delivery of a stolen television set to the defendant.

On Saturday, March 8, 1969 a front page story of a Waterbury newspaper reported that the Connecticut State Police were investigating a stolen goods ring in Waterbury that allegedly concerned members of the Waterbury Police Department. (St. App. pp. 86a, 87a)

On Monday, March 10, 1969, Attorney Timothy Moynahan telephoned the State's Attorney Office and stated: "Is that son-of-a-bitch there?" (St. App. pp. 80a, 86a) "Tell him to stay there because I am coming over." (St. App. p. 80a) Attorney Moynahan did, in fact, come to the State's Attorney's Office that morning and strongly criticized State's Attorney McDonald and the Connecticut State Police for the manner in which the stolen goods ring investigation was being conducted. (St. App. pp. 80a, 81a)

At the very same time, the defendant was nervous and upset at the police headquarters. (St. App. pp. 80a, 95a) In fact, Mr. Fred Sullivan, Superintendent of the Waterbury Police Department, gave the defendant a librium pill and then called State's Attorney McDonald to advise him of the defendant's actions and to ask him to get the investigation moving. (Finding 214, P.R. p. 77, St. App. p. 80a)

On that same date, March 10, 1969, Attorney Moynahan wrote a letter to State's Attorney McDonald stating: "This is to confirm our conversation of Monday, March 10th in which I advise you that I was still the attorney for Charles Vernale and that I was requesting that he not be contacted by the State Police." (St. App. p. 86a)

At approximately 7:45 p.m. on the same date, March 10, 1969, the defendant and Henry Byrnes, Chief of Detectives of the Waterbury Police Department and a long time friend of the defendant, went to the home of Sergeant Edward Courtney of the Connecticut State

Police. (Finding 69, 277, P.R. pp. 65, 154) For one month prior to that date Sergeant Courtney had been assigned, with a team of state policemen to investigate a stolen goods ring in the City of Waterbury. (Finding 70, 277, P.R. pp. 65, 154) According to Sergeant Courtney's testimony a heated argument took place in front of his home in the defendant's Cadillac. (Finding 73, 74, 277, P.R. pp. 65, 154) Sergeant Courtney testified that the defendant stated that if Courtney wanted him, he could have him right on the street there. (Finding 75, 277, P.R. pp. 66, 154) During this time the defendant was boisterous and argumentative, yelling and pointing his finger at Courtney. (Finding 74, 277, P.R. pp. 66, 154) Courtney further testified that Moynahan asked if Captain Bishop or State's Attorney McDonald were running the investigation. (Finding 76, 277, P.R. 66, 154) The defendant told Courtney that the State's Attorney was trying to tie Moynahan and Lieutenant Griffin to Vernale as fences and that the State's Attorney was trying to place him with a stolen television set from Vernale. (Finding 77, 78, 277, P.R. pp. 66, 154) Courtney testified that the defendant stated he had plenty of money to get a dozen sets right then and did not need one from Vernale (Finding 79, P.R. pp. 66) He further told Courtney that television sets were small items and insurance companies pay off on them. (Finding 79, P.R. pp. 66, 154) The defendant also said to Courtney, in a loud tone, that policemen should protect policemen, not persecute them. (Finding 81, 277, P.R. pp. 66, 154) The conversation was repeated for twenty-five to thirty minutes and then Moynahan and Byrnes left. (Finding 82, 277, P.R. pp. 66, 154) The defendant had never been to Courtney's home before. (Finding 83, 277, P.R. pp. 66, 155)

Later that same night, at 1:30 a.m. on March 11, 1969, the defendant and Inspector Byrnes went to the home of State's Attorney McDonald in Middlebury, Connecticut. (Finding 84, P.R. p. 66) Troopers Brodeur and Caputo of the Connecticut State Police testified

regarding their observations when they responded to a call for assistance at 1:50 a.m. on said date. (Finding 84, 99, 278, 280, P.R. pp. 66, 67, 157, 164) Trooper Brodeur testified that when he arrived he saw Moynahan and Inspector Byrnes outside the McDonald home. (Finding 278, P.R. p. 157) He said that the defendant told him he just came to talk to McDonald as he and McDonald were friends but that the latter, to whom he referred to in obscenities, didn't have the guts to talk to him. (Finding 100, 278, P.R. pp. 68 157) Byrnes stated to Brodeur in the presence of Moynahan that Byrnes wanted to talk to McDonald about the investigation, referring to both the investigation and McDonald in obscenities. (Finding 103, 278, P.R. pp. 68, 158) Trooper Caputo corroborated Trooper Brodeur's observations, describing Moynahan as excited but neat, with a moderate ordor of alcohol. (Finding 280, P.R. p. 164)

State's Attorney Francis M. McDonald testified that on March 11, 1969 at approximately 1:30 a.m. he and his family were asleep when Moynahan and Byrnes arrived at their home. (Finding 89, 281, P.R. pp. 67, 165) He said that Moynahan banged on the side porch and when McDonald asked who it was, Moynahan called up to McDonald's second floor bedroom window: "It's Paul Moynahan. I want to see. I want to talk to you." (Finding 90, 281, P.R. pp. 67, 165) Moynahan looked strange and wild and spoke in a loud, challenging voice. (Finding 91, 281, P.R. pp. 67, 165) McDonald got away from the window and went to the telephone. There was a loud pounding on the door downstairs and Moynahan was shouting in a loud voice, "Frank, Frank, I want to talk to you. Come down. Come down, you hero, you. Come down." (Finding 92, 281, P.R. pp. 67, 165, 166) The State's Attorney testified that this pounding, banging and shouting continued as he called the State Police at Bethany Barracks and the Middlebury Police. (Finding 93, 281, P.R. pp. 67, 166) In fact, the pounding and yelling by the defendant continued the entire time after McDonald got up until

the police cruisers arrived at the house some twenty minutes later. (Finding 98, 99, 281, P.R. pp. 67, 166) State's Attorney McDonald stated that Moynahan had never been at his home before that date. (Finding 101, 281, P.R. pp. 68, 166) There was evidence that Moynahan came to McDonald's home to intimidate him in the presence of his wife and children from doing his duty as State's Attorney. (Finding 107, 281, P.R. pp. 68, 166)

The day after these altercations, on March 11, 1969, the Honorable Milton Meyers appointed Justice P. B. O'Sullivan to act as a one man Grand Jury to investigate a stolen goods ring in the Waterbury area.

On March 18, and March 29, 1969, Attorney Timothy Moynahan visited Mr. Charles Vernale, a prospective witness of the said Grand Jury investigation, at the State Prison in Somers, Connecticut.

On March 27, 1969, a smashed, demolished, large, floor model, 22" Motorola color television set, early American, Colonial, maple finish was found by a truck driver in a wooded area near the Waterbury-Terryville city line. (Finding 23, 24, 26, 27, P.R. pp. 61, 62) This area is approximately 6.8 miles from the home of the defendant. (Finding 24, P.R. p. 61) Local police contacted the State Police who checked the serial number of this set and found that it was stolen from Martin's Appliance Store in North Haven, Connecticut on April 8, 1967. (Finding 1, 2, 3, 27, P.R. pp. 60, 62) Mr. Miller, the television repairman, was asked by the State Police to inspect this set. He did so, on the 1st and 2nd of April, 1969 and positively identified it as the set which he had repaired at the defendant's home. (Finding 39, 43, P.R. pp. 62, 63) He identified it by the unique nature of the work which he had performed on it. (Finding 43, P.R. p. 63) He also informed the State Police, with detailed accuracy, exactly what would be found when the metal shield was removed from the sound coil. (Finding 43, P.R. p. 63) Subsequently, on

April 3, 1969, the metal shield was removed by members of the Connecticut State Police and disclosed exactly what Mr. Miller had predicted, i.e., a black tape which supported soldered wires. (Finding 28, 29, 30, 31, 32, P.R. p. 62) This was a most unusual repair according to an expert witness and one which a repairman would vividly recall. (St. App. p. 104a)

During this time, the Grand Jury investigation was continuing. On April 1, 1969, Charles Vernale was called as a witness and, after conferring with his lawyer, Attorney Timothy Moynahan, he repudiated his prior statements and denied delivering a stolen television set to the defendant (St. App. p. 87a) Justice P. B. O'Sullivan, the investigating Grand Jury, asked Mr. Vernale if he (Vernale) thought he was using good judgment in having Attorney Moynahan as his counsel when suspicion was being directed toward Attorney Moynahan and his father, Paul Moynahan, concerning some criminal activity. Vernale responded that he didn't know who else to turn to since Attorney Moynahan had been representing him right along. (Tr. of Grand Jury, Vol. IV, April 1, 1969, pp. 394-400)

Two days later on April 3, 1969, Mr. Vernale came before the Grand Jury again and this time he affirmed his previous statements to the police and admitted delivering a stolen television set to the defendant. He admitted that he had lied in his previous testimony to the Grand Jury. He stated that because of his relationship with Paul Moynahan he didn't have the heart to implicate him. However, after he learned that Mr. Moynahan had stated that he (Moynahan) had used Vernale as an informer he changed his mind and decided to tell the truth. (Tr. of Grand Jury, Vol. VI, April 3, 1969, pp. 565-566)

On April 15, 1969, the defendant pleaded guilty to a charge of Breach of Peace for his conduct at the McDonald's home on March 11, 1969. (St. App. pp. 98a, 99a, 106a)

On May 6, 1969, the defendant testified before Justice P. B. O'Sullivan, the investigating Grand Jury. (Finding 55, P.R. p. 64) At that time the defendant admitted that there was a color television in his home prior to December, 1968. (Finding 56, 194, P. R. pp. 64, 75) He testified that he had borrowed a 23" mahogany Motorola console television set from Mr. Anthony Caggiano. (Finding 57, 59, P.R. p. 64) Mr. Moynahan stated that Mr. Caggiano was now dead. (Finding 60, P.R. p. 60) He also recalled that there was color problems but not sound problems with this borrowed television. (Finding 58, P.R. p. 64) Mr. Moynahan told the Grand Jury that he called three different repairmen to fix this set, one of whom was Edward Miller, a man he had met at Vernale's house. (Finding 61, P.R. p. 64) The defendant admitted that Mr. Miller came to his home on a Sunday in 1967 to repair the set. (Finding 61, 62, 63, 277, P.R. pp. 64, 78) The defendant remembered paying a total of twenty dollars ($20) to the three repairmen to fix a set he didn't own. (St. App. pp. 91a, 92a) Finally, he admitted that he neglected to inform State's Attorney McDonald and Captain Bishop regarding this television when they interviewed him on February 8, 1969 (St. App. p. 94a)

In June, 1969, the findings of the Grand Jury were completed and thereafter a bench warrant was issued and the defendant was arrested on charges of Conspiracy to commit larceny in excess of $250.00 but less than $2,000.00 in violation of Section 54-197 of the Connecticut General Statutes and Larceny in excess of $250.00 but less than $2,000.00 in violation of Section 53-63 of the Connecticut General Statutes.

On September 11, 1969, the defendant filed the following motions: (1) Motion To Quash the Information because Captain Bishop attended a session before the Grand Jury; (2) Motion For Change of Venue because of allegedly inflammatory pretrial publicity in Water-

bury newspapers; and (3) Motion For Production And Inspection. The first two motion were denied by Judge Barber and the final one was granted in part.

On September 23, 1969, the defendant filed a Motion To Dismiss upon the grounds that: (A) Prosecution by the State's Attorney's Office is unconstitutional; (B) Section 54-47 of the Connecticut General Statutes which authorizes the one-man Grand Jury is unconstitutional. This motion was denied by the Court (Barber, J.).

November 1, 1969, the defendant filed a Motion To Dismiss for the alleged failure of the State to comply with the orders of the Court regarding the defendant's Motion For Production And Inspection. This motion was denied on November 25, 1969 by Judge Barber.

On January 8, 1970, the defendant field a Motion For Immediate Trial.

On January 13, 1970, the State filed a Bill of Particulars and Substitute Information, charging the defendant with receiving stolen goods in violation of Section 53-65 of the Connecticut General Statutes.

After the selection of a jury of twelve (12) the trial commenced on January 15, 1970.

The State's case consisted of evidence of the theft of the television set from Martin's Appliance Co. in North Haven on April 8, 1967; admission of said theft by the thief, John Bishop, and his testimony regarding the ultimate delivery of said set into the defendant's living room. (St. App. pp. 4a, 5a) Evidence was introduced regarding the discovery of a demolished television set on March 27, 1969 in a desolate area in the Terryville section of Plymouth, 6.8 miles from the defendant's home. (St. App. p. 18a) Next, Edward Miller, the television repairman, testified regarding the unique repair which he had performed on the sound coil in the defendant's television set in the defendant's home in

the summer of 1967. (St. App. pp. 21a, 22a) He positively identified the set found in Terryville as the set upon which he had made the repair. (St. App. pp. 22a, 29a) Miller's testimony was bolstered by the fact that he had described the unique repair in detail before the set was even discovered, and when it was found, he predicted precisely what would be found when a metal shield, which was covering the sound coil, was removed. (St. App. pp. 22a, 23a) When the shield was removed, the repair uncovered corresponded in every detail with Miller's prediction. (App. pp. 21a, 22a, 30a, 31a)

Captain Wayne Bishop of the State Police testified regarding an interview with the defendant on February 8, 1969, and the testimony of the defendant before the Grand Jury on May 6, 1969. (St. App. pp. 32a, 33a) The State offered evidence of consciousness of guilt of the defendant through the testimony of Sergeant Edward Courtney of the Connecticut State Police, two Connecticut State Police troopers and State's Attorney and Mrs. Francis M. McDonald regarding the conduct of the defendant at the Courtney and McDonald homes on the evening of March 10, and early morning hours of March 11, 1969. (St. App. pp. 73a-82a)

Finally, to corroborate the testimony of Captain Bishop and the defendant that repairs in the Moynahan home were being made at the same time that Attorney Moynahan was renovating his office on Gaffney Place in Waterbury, the State introduced a certified copy of building permit number 4422C dated May 2, 1967, issued to Timothy Moynahan by the Building Department of the City of Waterbury. (St. App. pp. 82a, 83a)

The defendant's case consisted of testimony from Attorney Timothy Moynahan that there was a color television set in his parent's home in June or July of 1967, but it was not the set found in Terryville. (St. App. p. 83a) He also reviewed his representations of

Charles Vernale and his own involvement in the investigation by the Connecticut State Police of the stolen goods ring in Waterbury (St. App. pp. 93a-85a)

Then the defendant Paul Moynahan, took the stand in his own behalf and testified that in the summer of 1967 he had a color television set in his home which he had received from Mr. Tony Caggiano, a deceased television repairman. (St. App. p. 89a) The defendant stated that this set was a secondhand set which Caggiano left in his home to try out, but it was not the set in evidence. (St. App. pp. 89a, 90a) According to the defendant, this set had problems in that the colors would run and it would get hot. (St. App. p. 90a) At the defendant's request it had been repaired by three television repairmen: Mr. Caggiano, Mr. Frank Maiola and Mr. Edward Miller. (St. App. p. 90a) The defendant admitted that he met Mr. Miller through the same Charles Vernale who the state claimed gave Moynahan the television set. (St. App. pp. 90a, 92a) The defendant acknowledged that he had asked Miller to repair this set on a Sunday in the summer of 1967, but denied that the repair was to the sound coil on the set. (St. App. p. 92a) He also denied ever receiving a color television set from Charles Vernale. (St. App. p. 90a)

The defendant admitted knowing Charles Vernale for over ten (10) years as a "fence" and a thief, but nevertheless considered him a friend. (Find. 47, 65, 66, 231, R. pp. 63, 65, 78) Despite this friendship, the defendant maintained that he would never accept anything from Charles Vernale because of his reputation as a receiver of stolen goods, his criminal record and his activities. (Finding 50, 51, 230, 234, P.R. pp. 64, 78) The defendant acknowleged being present in 1965 when three stolen television sets were removed from the home of Charles Vernale by members of the Waterbury Police Department. (Finding 65, 199, P.R. pp. 65, 76) An he admitted knowledge of the criminal records

of Charles Vernale (which includes a 1962 conviction for possession of obscene films and a 1965 conviction for pool selling) and John Bishop (which includes four convictions for breaking and entering and two convictions for larceny). (Finding 64, 119, 230, P.R. pp. 65, 69, 78)

Regarding his conduct on the evening of March 10, 1969, at Sergeant Courtney's house, the defendant told an entirely different version of that meeting, saying that "there was no boisterous conversation whatsoever." (St. App. p. 96a) He denied most of the statements attributed to him by Sergeant Courtney and called Courtney a "liar", a "brazen liar." (St. App. pp. 97a, 98a)

Concerning the incident at the home of State's Attorney McDonald, the defendant admitted driving there, but disputed the time, claiming it was around midnight rather than 1:30 a.m. as the state's witnesses had testified. (St. App. p. 97a) He denied being drunk. (St. App. p. 98a) He testified that he didn't pound on the door and didn't yell "Come down, you hero, come down", but merely knocked on the door and when Mr. McDonald came to the upstairs window Moynahan said: "I would like to tak to you Frank." (St. App. p. 98a) According to Moynahan's testimony, he and Inspector Byrnes just stood by patiently after this, talking between themselves while waiting for Mr. McDonald. (St. App. p. 98a) The next thing they knew, the police arrived. (St. App. p. 98a) Moynahan testified that the testimony of the troopers was "incorrect" and the McDonald's were "mistaken" in their recollection of the incident. (St. App. p. 98a) Finally, the defendant testified that his plea of guilty to a charge of Breach of Peace as a result of his actions at the McDonald home was an involuntary plea because he was forced into it by threats of the State's Attorney for New Haven County. (St. App. pp. 98a, 99a)

Next, the defense called Frank Maiola, a Waterbury television repairman, who testified that he repaired a television set in the home of the defendant in the summer of 1967. (St. App. p. 99a) He said that he never notices the makes or models of the televisions upon which he works, but he does recall a "little burn mark" on the chassis of the television which he repaired at the defendant's home. (St. App. p. 99a) He did not see such a mark on the television in evidence. (St. App. p. 99a) On cross-examination, Mr. Maiolo acknowledged that the mark he saw was a black carbon mark which usually covers a little scorch on the chassis. (St. App. p. 101a) Since he did not wipe off the carbon he could not say whether such a scorch was made on the television set which he repaired in the defendant's home. (St. App. p. 101a) More importantly, at the conclusion of his testimony, Mr. Maiolo acknowledged that he had told an untruth under oath regarding whether he had discussed his testimony with anyone. (St. App. pp. 101a-103a) Initially he stated he had not, specifically denying a discussion with Attorney Moynahan. (St. App. p. 100a) Later, however, he admitted Attorney Moynahan had telephoned him the night before and discussed his testimony. (St. App. p. 102a)

The defense called Dr. Paula Moynahan, daughter of the defendant, who testified that she was present when Mr. Caggiano delivered a color television set to the Moynahan home. (St. App. p. 103a) She described Caggiano as having grayish black hair. (St. App. p. 103a)

The defense also called friends of Attorney Moynahan who allegedly had watched television in the Moynahan home and testified that the television they watched was not the television in evidence.

Finally, the defense called numerous character witnesses for the defendant including several Waterbury police officers and the mayor and three former mayors of the City of Waterbury.

In rebuttal, the State called Leon Kramer, an expert in electronics and specifically television, who testified that in his opinion the repair to the sound coil on the television in evidence is not a normal repair. (St. App. p. 104a) Furthermore, based on his training and experience, he believed that a repairman who performed such a unique repair would recognize his work product. (St. App. p. 104a)

Next, to rebut the defendant's testimony that he arrived at the McDonald home at midnight, the State called the trooper who was desk officer at Bethany Barracks on the midnight shift on March 11, 1969. According to the police log on that date, a call was received from State's Attorney McDonald on March 11, 1969 at 1:30 a.m. (St. App. p. 105a)

Next, the State called Mrs. Tony Caggiano, wife of the man who allegedly loaned a defective color television to the defendant in the summer of 1967. Mrs. Caggiano testified that her husband died on June 12, 1968 and that prior to his death he worked exclusively on black and white televisions. (St. App. p. 105a) Contrary to Miss Paula Moynahan's testimony, she described her husband as bald. (St. App. p. 105a)

The bookkeeper at Mr. Caggiano's former place of business was called and testified that during 1966, 1967 and 1968 the business did not have any second-hand Motorola color television sets and therefore could not have loaned out such a set. (St. App. p. 105a) She also testified that Mr. Caggiano was "bald", "really bald". (St. App. p. 106a)

Finally, to contradict the defendant's claim regarding an involuntary guilty plea to the breach of peace charge arising out of the defendant's conduct at the residence of State's Attorney McDonald in the early morning hours of March 11, 1969, the State introduced a certified copy of the transcript of the change of plea proceedings before the Superior Court (MacDonald, J.) in New Haven. Said transcript reflects the following colloquy: "The Court: You have done so (pleaded guilty) voluntarily without any promise, threat, or anything else? "The Accused: Yes, sir." (St. App. p. 106a)

On February 4, 1970, the jury returned a verdict of guilty. On the same date, the defendant filed a Motion For Judgment Under Rule 255. This motion was denied on March 6, 1970 by Judge Zarrilli.

On March 6, 1970, the defendant was sentenced to the custody of the Commissioner of Correction at Somers for a term of not less than one year and one day nor more than two years and fined $500.00.

He appealed to the Supreme Court of the State of Connecticut. On April 24, 1973 the Connecticut Supreme Court entered judgment affirming the conviction of the defendant. On April 30, 1973 a motion to reargue was filed and on May 25, 1973 the same was denied.

The defendant's petition for a writ of certrorari requests a review of the judgment and opinion of the Supreme Court of the State of Connecticut which is annexed to the petition.

IV. ARGUMENT OF LAW

Question 1: The State requested the court to call as the court's witness, Mr. Vernale, who had already been identified by various State witnesses as the "fence" for John Bishop's stolen merchandise, (St. App. pp. 33a, 36a), a friend and informant of the defendant (St. App. pp. 36a, 93a), and the person who assisted Mr. Bishop in delivering the stolen television set in question to the defendant's home. (St. App. p. 5a) The State claimed this rather unusual procedure was necessary because Mr. Vernale was a witness who would ordinarily be called to prove the State's theory of the crime, but one who had given previous contradictory statements regarding the defendant's involvement. (P.R. pp. 125, 126) As a result, the State represented to the court that it could not vouch for the veracity of Vernale and asked the court to call him as its witness. (P.R. p. 125)

The court entertained argument on this question in the absence of the jury. During said argument the defendant moved the court to make inquiry in the absence of the jury to determine if Mr. Vernale was going to invoke his Fifth Amendment privilege. (P.R. p. 127) The court denied this motion and the defendant took an exception. (P.R. p. 128) This is the only objection or exception which the defendant asserted regarding the testimony of Mr. Vernale. (St. App. pp. 46a-49a) The defendant did not object or take an exception to any of the three (3) questions asked of Mr. Vernale to which he invoked his testamentary privilege. It is respectfully submitted that the defendant did not object because he believed the witnesses' answers might be beneficial to him. After the trial, having acquired the wisdom of hindsight, for the first time he claimed the witnesse's invocation of the privilege against self-incrimination was prejudicial to him. He also made the preposterous assertion that the "breadth" of the court's ruling on his earlier motion

regarding the invocation by Vernale of his Fifth Amendment privilege in the jury's presence "precluded any further objection." (Def's. State Brief, p. 33) Such a position is untenable. The state procedure to be followed before a ruling will be made a ground of appeal is clearly established (Connecticut Practice Book S 226) and the Supreme Court of the State of Connecticut has consistently upheld the same. **Budney vs. Ives**, 156 Conn. 83, 91 (1968); **Skinner vs. Skinner**, 154 Conn. 107, 110 (1966); **Sears vs. Curtis**, 147 Conn. 311, 313 (1960); **Presta vs. Monnier**, 145 Conn. 694, 703 (1958); **Gerrieri vs. Merrick**, 145 Conn. 432, 435 (1958). The present claim was not made to the trial court and therefore it never had an opportunity to pass upon the same. Although the Connecticut Supreme Court could have denied this claimed error on this basis alone, (Dec. Def's App. 22b), it examined the merits of this question.

This legal issue was actually resolved prior to Mr. Vernale taking the stand. In the absence of the jury, a colloquy occurred which clearly established that the state had no prior knowledge of what Mr. Vernale was going to say. Although the petitioner has omitter relevant portions of this colloquy in his appendix to this court, the state has inserted the same in the appendix hereto. (App. pp. 1A-5A)

The fact that the State had no prior knowledge that Mr. Vernale would invoke the privilege against self-incrimination is determinative of this issue. In the leading case of **Namet vs. United States**, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1968), the Supreme Court (Stewart, J.) stated:

> "None of the several decisions dealing with this question suggests that reversible error is invariably committed whenever a witness claims his privilege not to answer. Rather, the lower courts have looked to the surrounding circumstances in each case, focusing pri-

marily on two factors, each of which suggests a distinct ground of error. First, some courts have indicated that error may be based upon a concept of prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege. This seems to have been one of the principal reasons underlying the finding of reversible error in **United States vs. Maloney supra.** In that case, the prosecution admitted knowing that two of its key witnesses could validly invoke the privilege against self-incrimination and intended to do so. The prosecutor nevertheless called and questioned them. The court also found that the Government's closing argument attempted to make use of the adverse inferences from their refusals to testify. See also **United States vs. Tucker**, 3 Cir., 267 F. 2d.

"A second theory seems to rest upon the conclusion that, in the circumstances of a given case, inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant. This theory seems also to have been present to some extent in the **Maloney** decision, where the court noted the challenged inferences were the only corroboration for dubious and interested testimony by the Government's chief witness. 262 F. 2d at 536-537. On the other hand, courts have failed to find reversible error when such episodes were "no more than minor lapses through a long trial." **United States vs. Hiss**, 185 F. 2d 822, 832 (C.A. 2d Cir.) See also **United States vs. Amadio**, 215 F. 2d 605, 614 (C.A. 7th Cir.), and even when the objectionable inferences

> might have been found prejudicial, it has been held that instructions to the jury to disregard them sufficiently cured the error."

In the present case the defendant appears to contend that error was committed under the first theory. (Def's. State Brief pp. 30-35) He claims that the State should have known that Vernale was going to invoke the Fifth Amendment, but questioned him nevertheless. He also argues that failure to cease questioning after the witness initially invoked the privilege against self incrimination smacks of bad faith. (Def's State Brief p. 33)

In the first place, the record does not support any inference of prosecutorial misconduct. (Dec. Def's App. p. 23b) Rather, it reflects full disclosure of this question in advance of the appearance of Vernale. It further shows full discussion of the merits of this issue, the procedure to be followed, and acquiescence therein by counsel for the defendant. (St. App. pp. 41a-45a) If such conducts amounts to prosecutorial bad faith, one wonders what the state must do to show good faith.

> As noted by the Supreme Court of the State of Connecticut:
>
> "That portion of the defendant's brief relating to this claim is devoted chiefly to the conduct of the state's attorney. The record does not support any inference of prosecutorial misconduct. There was full disclosure in advance of Vernale's appearance and full discussion of the merits of the issue and procedure to be followed. The state was in a dilemma in that Vernale was a witness that the state would naturally produce and one whom it had power to produce and his absence would be subject to an unfavorable inference under the rule as set forth in **Secondino vs. New Haven Gas Co.**, 147 Conn. 672, 675, 165 A. 2d 598; **Queen vs. Gagliola**, 162 Conn. 164, 168, 292 A. 2d 890; see also **United States vs. Gernie**, 252 F. 2d

664 (2d Cir.). The state revealed that it could not know to what Vernale would testify and when the witness did refuse to testify the state did not continue to seek answers involving the issue of the television set on which the witness had claimed the privilege. The state's action in the case before us was a far cry from that of the prosecution in **Douglas vs. Alabama**, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934, relied on by the defendant. The **Douglas** case involved flagrant impropriety on the part of the prosecutor who read an accomplice's confession bit by bit in the form of questions, pausing to ask the witness after each piece: "Did you make that statement?" and thereby compelling repeated reliance on the witness' claim of privilege.

"Viewing the entire record, the possible inferences from Vernale's refusal to testify did not add critical weight to the state's case in a form not subject to cross-examination, especially when asked directly why he refused to answer, demonstrate that the state was not using Vernale's invocation of the privilege in an improper manner. Furthermore, it cannot be said here that these claims of privilege were the only source or the chief source of the inference of criminal activity. **Namet vs. United States**, supra, 189; **United States vs. Jenkins**, 442 F. 2d 429 (5th Cir.); **United States ex rel. Fournier vs. Pinto**, 408 F. 2d 539 (3d Cir.), habeas corpus granted due to a combination of the prosecutor's misconduct and error in the charge. The court's cautionary charge on this issue to the jury was curative of any prejudice which might possibly have arisen because of this witness' claim of privilege. No error was committed in allowing the testimony of Vernale to the extent it was give." (Dec. Def's App. pp. 23b, 24b)

Question 2: The defendant claims the trial court unreasonably limited the cross-examination of Edward Miller on the issue of Miller's interest or motive for testifying. (Def's. State Brief, pp. 18-27) As a matter of fact, the court was extremely liberal in its ruling regarding the scope of cross-examination of Mr. Miller.

On cross-examination, Mr. Miller's recollection regarding the repair of the television set in the defendant's home was throughly explored. He was quizzed regarding the time of the repair, the day, the date, the clothing he wore, even what he had had for breakfast that day. (St. App. p. 23a) Of course, Mr. Miller was also questioned regarding the minutest details of the repair which he had made. (St. App. pp. 23a, 24a)

The cross-examination also elicited information regarding other repairs and other sales of television sets by Mr. Miller during 1967. (St. App. pp. 25a, 26a) The defendant used three statements which Mr. Miller had given to the police as well as his testimony before the Grand Jury in an elaborate and exhaustive attempt to impeach and discredit his testimony. (St. App. pp. 26a-28a)

Finally, over the State's objection, Mr. Miller answered questions regarding his relationship to Charles Vernale. (St. App. pp. 25a, 27a) He told how he had performed work for Mr. Vernale on three occasions and how he had fixed television sets for two friends of Vernale. (St. App. pp. 25a-27a) In addition, Mr. Miller testified that he had sold two television sets which he had received from Vernale; one to a Mr. Stevens and the other to a Mr. Gaspari. (St. App. pp. 25a, 26a) When the cross-examination sought to elicit details of Mr. Miller's business records regarding these sales, the court sustained the State's objection, ruling that such an inquiry would be too remote to the issues of the case.

Of course, a trial court has wide discretion in its rulings on the relevancy of evidence. **State vs. Mah-**

mood, 158 Conn. 536, 265 A. 2d 83 (1969; **State vs. Towles**, 155 Conn. 516, 523, 235 A. 2d 639 (1967); **State vs. Keating**, 151 Conn. 592, 592, 200 A. 2d 724; Cert denied 379 U.S. 963 (1964); **State vs. Bassett**, 151 Conn. 547, 551, 200 A. 2d 473 (1964); **State vs. Luzzi**, 147 Conn. 40, 46, 156 A. 2d 505 (1959). It is a reasonable exercise of judicial discretion to exclude questions which would introduce "issues foreign to the case at bar and of no substantial importance." **State vs. Dortch**, 139 Conn. 317, 325 (1952); or evidence the relevancy of which "may be slight and inconsequential that to admit it would distract attention which should be concentrated on other evidence which bears directly on vital points. **State vs. Bassett**, supra at 551.

Under the facts of the present case, the court granted every opportunity to the defendant to show that Mr. Miller was somehow linked to Charles Vernale and thus, presumably, could not be believed. The defendant made good use of this broad exercise of discretion in his favor, but was unable to convince the jury of Mr. Miller's alleged untruthfulness.

Question 3: Through Captain Wayne Bishop of the Connecticut State Police the State offered testimony regarding an interview with the defendant on February 8, 1969. (Finding 44, P.R. p. 63) This interview was conducted at the State's Attorney's Office in Waterbury in the presence of State's Attorney McDonald, Superintendent Sullivan of the Waterbury Police Department, and Sergeant Sullivan and Corporal Smith of the Connecticut State Police. (St. App. p. 32a) A tape recording was made of the interview and subsequently a verbatim transcript was compiled and delivered to the defendant prior to the trial. (St. App. p. 35a)

The defendant objected to this testimony of Captain Bishop claiming that the verbatim transcript was the best evidence of the interview and therefore oral testimony concerning it was inadmissible. The trial court properly overruled the defendant's objection.

The defendant's claim overlooks the distinction which exists in a case in which proof of a document is essential and a case in which the document is only collaterally involved. The best evidence rule has no application to the present case because the essential fact to be established through the testimony of Captain Bishop was neither the existence nor the contents of the interview itself to which the writing is merely collateral or incidental. **Monroe vs. United States**, (A. D. C.) 234 F. 2d 49, 54; **Farr vs. Zoning Board of Appeals**, 139 Conn. 577, 582 (1953); **Kilpatrick vs. Kilpatrick**, 123 Conn. 218, 225 (1937); **Matthews vs. Livingston**, 86 Conn. 263, 273 (1912); 29 Am. Jur. 2d Evidence 449, 450; see 4 Wigmore, Evidence (3d Ed.) S 1246. As the Supreme Court of Connecticut observed:

> "The questions sought to discover what the witness had said during the interview. Anyone who has heard an oral statement made and remembers it may testify to what was said. **Brzezinski vs. United States**, 198 F. 65 66 (2d Cir . . . While recordings might be more accurate and reliable evidence under ordinary circumstances than testimony from memory, the latter is not rendered incompetent by the fact of the existence of the former. **People vs. Kulwin**, 102 Cal. App. 2d 104, 226 P. 2d 657."

Question 4: In the present case the court used the standard Connecticut instruction to the jury regarding the weight to be accorded the defendant's own testimony. See Wright, **Connecticut Jury Instructions** (Vol. II) S 669; **State vs. Guthridge**, 164 Conn. (34 Conn. L.J. No. 26, pp. 1, 3); **State vs. Cari**, 163 Conn. 174 (1973); **State vs. Palko**, 122 Conn. 529, 534 (1937); **aff'd** 302 U. S. 319 (1937), **State vs. Schleifer**, 102 Conn. 708, 725 (1925); **State vs. Saxon**, 87 Conn. 5 21 (1913); **State vs. Fiske**, 63 Conn. 388, 392 (1893).

It is respectfully submitted that this standard charge is in line with the view of the majority of courts throughout the United States. Furthermore, most of the decisions adopting a contrary view can be distinguished from the instant case by the very wording of the instructions in question. In the principal case cited by the defendant, **Iowa vs. Bester**, 167 N.W. 2d 705 (Iowa, 1969), the court charged:

> "In considering and weighing his testimony **you are not required to receive the testimony of the defendant as true**, but to give it full and careful consideration, and determine whether it or any part of it is true or false, and **whether such testimony is given by** the defendant in good faith or **for the purpose of avoiding conviction.**" (emphasis added)

Obviously such an instruction singles out the defendant for comment and does not mention other witnesses. This is not the situation in the instant case, for in this portion of the charge the court concluded:

> "An accused person, having become a witness, stands before you **just like any other witness**, and is entitled to the same consideration and must have his testimony measured in the same way as **any other** witness, including however, his interest in the verdict you are to render." (emphasis added) P.R. p. 82)

Indeed, an examination of the entire charge in the instant case shows that the court gave clear instructions on the presumption of innocence and the burden of proof at the very beginning of its charge (St. App. 113a, 114a) In addition, the testimony of the defendant was not singled out for the court also commented on the weight to be accorded the testimony of police officers, admitted prejurers and convicted felons.

Question 5: The rulings of the state courts regarding pre-trial production of claimed exculpatory material in this case conforms to the law of criminal discovery in Connecticut and is consistent with the decisions of this Court. Section 54-86(a) of the Connecticut General Statutes establishes what information or material shall be available to a defendant prior to trial. In the present case the court followed the mandate of this statute when it ordered the state to produce the written or recorded statements of the defendant and any exculpatory information which the State had in its possession. (P.R. pp. 13, 139)

Neither Section 54-86 (a) nor **Brady vs. Maryland**, 373 U. S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215, upon which the defendant relies, requires disclosure of statements of witnesses prior to trial. On the contrary, in the widely quoted case of **United States vs. Manhattan Brush Co.**, 38 F.R.D. 4, the court held that **Brady, supra** did not require a pretrial disclosure of the Government's case and the statements of witnesses could be obtained only after the witness had testified. This is precisely the procedure followed in the instant case. Other courts ruling that **Brady** does not require pretrial discovery include: **United States vs. Harris**, 409 F. 2d 77 (4th Cir. 1969); **Archer vs. United States**, 393 F. 2d 124, 126 (5th Cir., 1968); **United States vs. Jordan**, 399 F. 2d 610, 615 (2nd Cir. 1968).

In his argument on the motion to dismiss the defendant contended that the court should search the file of the State to determine if it contained exculpatory information which had not been disclosed. (P.R. p. 141) The court refused. (P.R. p. 142) This ruling is in line with the prevailing authority in this area. In **Dennis vs. United States**, 384 U. S. 855, 875; 16 L. Ed. 2d 973; 86 S. Ct. 1840 (1966), the court stated:

> "In our adversary system, it is enough for judges to judge. The determination of what

> may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production . . ."

In the present case, the attempt by the defendant to have the court review voluminous transcripts of Grand Jury hearings, statements, interviews and reports was denied. The decision of the court was procedurally sound and legally correct.

Question 6: At the conclusion of the direct examination of state witnesses, the State followed the procedure established by Section 54-86 (b) of the Connecticut General Statutes and delivered to the defendant all statements of the witnesses which related to the subject matter as to which the witnesses had testified. As a matter of fact, the order of the court was broader in scope than the requirements of Section 54-86 (b) and included testimony of these witnesses before the Grand Jury. The State complied with this liberal interpretation of its duty to disclose.

Nevertheless, the defendant objected claiming that the State had exculpatory information in its possession which it failed to produce. This baseless claim was made despite the fact that two judges made independent reviews of this question at the request of the defendant and both found nothing improper in the material produced pursuant to the court's pretrial order of production and inspection dated September 23, 1969. (P.R. pp. 13-13)

As a matter of fact, throughout this trial the State acknowleged awareness of its duty pursuant to the decision of the Connecticut Supreme Court in **State vs. Zimnaruk**, 128 Conn. 124, 127 (1941) and the decisions of this court in **Brady vs. State of Maryland, supra** and **Giles vs. Maryland**, 386 U. S. 66, 17 L. Ed. 2d 737, 87 S.

Ct. 793 (1967). (St. App. p. 57a-59a) The record does not show a transgression from the rules established by these cases on the part of the State in this case. It cannot be shown because none exists. The defendant was granted greater discovery rights than the law requires.

Furthermore, the court offered to continue the case a reasonable period of time to afford the defendant a further opportunity to obtain information regarding the State's case, but this offer was never acted upon by the defendant. (St. App. pp. 20a, 106a, 107a) Under such circumstances, it has been held that a defendant cannot later claim prejudice. **United States vs. Calabrese**, (6th Cir.) 1970 421 F. 2d 108, 111-113.

Question 7: On March 11, 1969, Superior Court judge Milton Meyers appointed Justice P. B. O'Sullivan under Section 54-57 of the Connecticut General Statutes to act as a one-man Grand Jury to investigate a stolen goods ring in the Waterbury area.

In June, 1969, the findings of the Grand Jury were completed and, thereafter, the defendant was arrested pursuant to a bench warrant.

The defendant argues that his constitutional rights were violated when he was interviewed by the Grand Jury and that Section 54-47 of the Connecticut General Statutes is unconstitutional on its face and as applied. This statute has withstood many such attacks, one of the more recent of which is the case of **Salvaggio vs. Cotter**, (D. Conn.) 324 F. Supp. 681; affirmed 447 F. 2d 1406. In **Salvaggio**, the court (Claire, J.) stated:

> "The State has always been considered to have the broad inherent power, through grand jury process, to investigate possible criminal conduct, as a basis for formally charging the commission of a crime.

"The federal Constitution too has historically treated the function of a grand jury to be judicial in character. Generally it has been instrusted with the authority to investigate either by direction of the court, the district attorney, or its own body, any suspected commission of crime; and determine whether or not the crime has been committed, and if so, who committed it. This custom and practice has been sanctioned by long usage and general recognition.

"The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its finding. The proceeding before a grand jury constitutes "a judicial inquiry", **Hale vs. Henkel**, 201 U. S. 43, 26 S. Ct. 370, 50 L. Ed. 652 (1906) of the most ancient lineage. **Cobbledick vs. United States**, 309 U. S. 323, 327, 60 S. Ct. 540, 542, 84 L. Ed. 783 (1940); see also, **Hermans vs. United States**, 163 F. 2d 228, 236-237 (6th Cir. 1947).

"Connecticut too has consistently recognized for many years this principle . . . The states have never been required to utilize the grand jury procedure as a condition precedent to a court presentment on a charge involving the commission of serious crime; although each has always been a prerequisite in the federal jurisdiction as provided under the Fifth Amendment to the federal Constitution. Thus, 'due process of law' under the Fourteenth Amendment has never required a grand jury indictment, even in a State's prosecution for a capital crime. **Hurtado vs. California**, 110

> U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884). A state is thus free to abolish the grand jury or reduce it in size, even to a single number and impart the investigating duties to a member of the judiciary, as it has done in this case. **In re Oliver**, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1947); **In reMurchison**, 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955)."

The case of **Puglia vs. Cotter**, (D. Conn.) 333 F. Supp. 940, **aff'd** 450 F. 2d 1362 cert. denied 405 U. S. 1073, 92 S. Ct. 492, 31 L. Ed. 2d 806, is in accord with the **Salvaggio** decision as is the case of **State vs. Hayes**, 127 Conn. 543, 577, 598 (1941).

Question 8: This issue was initially raised in the case of **State vs. Mazzadra**, 28 Conn. Sup. 252, wherein the court (Palmer, J.) stated:

> "The flaw which nullifies the defendant's argument is his claim that only the executive department of government may prosecute criminal offenses. Whatever the constitutions or laws of other states may provide, there is no established or recognized constitutional doctrine or principle in this state that criminal prosecutions must be undertaken by a member or agency of the executive department . . .
>
> "The defendant recognizes the fact that in **Adams vs. Rubinow**, 157 Conn. 150 (1968), a landmark decision in the annals of the constitutional law of this State, Chief Justice King said (p. 163, n. 4): "It perhaps should be pointed out that personnel in the judicial department . . . have from time immemorial been appointed by the judges of the respective courts . . . Thus, the appointment of the personnel in a Constitutional court, including, but not limited to, state's attorneys . . . is not within the power of the General Assembly under our State Constitution . . ."

In concluding its analysis of this question, the **Mazzadra** court observed:

> "The court is of the opinion that the defendant's claim is clearly without merit. However, even if there was a defect in the appointment of the state's attorney for New Haven County, as the defendant contends, the appointee is at least a de facto officer, and his right to perform the duties imposed upon him 'could only be assailed in a direct proceeding such as by writ of quo warranto.' **State vs. Hayes**, 127 Conn. 543, 577. The question is not open to the defendant in this criminal prosecution."

Subsequently the **Mazzadra** decision was cited with approval in the case of **State vs. Luban**, 28 Conn. Sup. 366 (1970). The **Mazzadra, Luban and DiLeo (State vs. DiLeo**, 28 Conn. Sup. 354 (1969) decisions accepted the dictum of **Adams** as an authoritative expression of the constitutional law of the State of Connecticut. The Connecticut Supreme Court endorsed this position by its decision in the present case. (Dec. Def's App. pp. 5b-8b).

This argument is also well answered by the recognized federal procedure in the event of a vacancy in the office of United State's Attorney. Title 28, United States Code, Section 546, provides that the District Court for the District where a vacancy occurs may appoint a United States Attorney until the vacancy is filled by the President. In **United States vs. Solomon,** (D.C.N.Y. 1963) 216 F. Supp. 835, such a procedure was found neither to violate the separation of powers doctrine or to violate the due process clause.

CONCLUSION

For these reasons, the petition for a writ of certiorari to the Supreme Court of the State of Connecticut should be denied.

Respectfully submitted,

The State of Connecticut,

By DENNIS F. GAFFNEY,
Special Assistant State's Attorney.

In The Supreme Court of the United States

OCTOBER TERM

No. 73-238

Paul C. Moynahan, Petitioner

v.

State of Connecticut, Respondent

Appendix To Brief In Opposition To Petition For A Writ of Certiorari To The Supreme Court Of The State Of Connecticut

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Portions of State Supreme Court Record and Appendix submitted in support of:

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1. Questions Sought to be Reviewed, No. 1 ..... 1A

1. With Respect to Questions Sought to be Reviewed, No. 1:

Prior to calling Charles Vernale as a witness the following occurred. (Tr. 801-818):

Mr. Gaffney. The next witness to be called is Mr. Vernale. His name has been mentioned. However, the State does not feel it could vouch for the veracity of this gentleman, and would ask the Court to call him as the Court's witness.

There is some authority for it, your Honor, and I would ask that this take place . . .

The Court. The question before the Court now is whether or not the Court should call Mr. Vernale. I don't believe that that should be done at this time.

It seems to me that you have a right to put Mr. Vernale on the stand and call him as a State's witness, and if he proves to be hostile, then, of course, you have your rights, as you well know.

Mr. Gaffney. Excuse me, your Honor, I am not claiming him as a hostile witness. He had made contradictory statements under oath on various occasions, so, frankly, we cannot vouch for his veracity.

As I understand the Connecticut law, a side calling a particular party must vouch for his veracity. It is the common practice in the Federal Court to call the witness as a Court's witness since he is a necessary witness to the case.

The Court. Is there objection on your part, Mr. Henessey, to having Mr. Vernale called as a Court's witness?

Mr. Hennessey. Well, I would like to say this, your Honor: . . .

I think it would be grossly prejudicial to permit a witness to take the stand and now, in a sense, the burden is being put on the Court to call him.

And then your Honor calls him and he invokes the Fifth Amendment in the presence of the jury. This is extremely prejudicial to us.

The Court. Well, Mr. Carolan is here representing Mr. Vernale . . . But, Mr. Hennessey, you don't have the right to make these claims. You, as counsel for Mr. Moynahan, have no standing to make any claims with reference to whatever rights Mr. Vernale has . . . The State has a right to call anybody. The State has a right to call you. The State has a right to call me as a witness, if necessary.

Mr. Hennessey. I am claiming, your Honor, that if the State calls a witness with any forewarning that this witness is going to invoke the Fifth Amendment in front of the jury, then I would submit that this would be prejudicial.

The Court. The State has a right to call the witness. If Mr. Vernale wants to invoke the Fifth Amendment that is up to Mr. Vernale. Then the Court must make a determination as to whether or not he must answer. But the regular procedure is that the State has a right to call any witness it sees fit . . . Now gentlemen, do you claim that the Court has a right to call this witness?

Mr. Gaffney. Yes, sir.

The Court. I would like to see some authority on that. I am not aware of it.

Mr. Gaffney. Well, if the court please, I think the general authority is that a party must vouch for the

veracity of its witnesses. In other words, we must vouch for the truthfulness of Mr. Vernale if we call him, and frankly, we cannot do that, and we represent that to the Court.

The Court. I, frankly, am unaware of any point of law on this issue, gentlemen.

Mr. Gaffney. May we have the opportunity to see if we could get you some specific authority on it.

I know it is a common practice in the Federal Courts.

The Court. I am not aware of it. I will be very frank, gentlemen. This is something very new to me.

I am not aware of it. Now, if you can show me some authority, I will consider it.

Mr. Gaffney. Thank you, your Honor.

The Court. We will take a short recess, Sheriff.

(Recess.)

(Court resumed - - still in the absence of the jury:)

The Court. You see, Mr. Hennessey, the cases which I have read, of course, I perhaps should have taken a little more time in doing this, but the cases I have read so far all were cases where after the privilege was invoked by the witness, the State persisted in reading into the record in the presence of the jury certain confessions and statements made by the witness which the Courts have said prejudiced the rights of the defendant.

Of course, I do not intend to go that far in this case, but it is my feeling offhand that they have a right to call Mr. Vernale initially to determine what his position is in the presence of the jury, and then from then on the court must make a determination as to how far the State has a right to go.

It would seem to me they should not be restricted in not calling him at all, because they don't know what his position is.

That is the representation that has been made to me; is that correct?

Mr. Gaffney. That is correct, your Honor. I would like the record to be crystal clear on that point, that we frankly do not know what Mr. Vernale is going to testify to.

The Court. You don't even know if he is going to balk as a witness?

Mr. Gaffney. No, I don't know.

The Court. You don't know if he is going to testify friendly?

Mr. Gaffney. That is correct.

The Court. Or be hostile, or is going to invoke his privilege?

Mr. Gaffney. Not through personal conversation with Mr. Vernale but through his attorney, I know what his attorney advised him. His attorney indicated to me he does not know what Mr. Vernale is going to do when he is called as a witness. So the State certainly has no notice of this whatsoever.

Mr. Hennessey. I did want to make it clear that my information is that the advice of Mr. Vernale's attorney to Mr. Vernale will be to invoke his privilege against self-incrimination. And it appears from the fact that the State has expressed this prior concern, is an indication to me that they have at least a belief that he may do this, or he may not.

I think they are representing in all candor they do not know, but he might very well do this.

The Court. Well, the public defender is here to protect Mr. Vernale's rights.

I am going to summon the jury into the courtroom, gentlemen, and ask you to call any witness you intend to call, and then we will proceed from there.

Mr. Hennessey. All right . . .